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AUTHOR Tyler, John Edward
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ABSTRACT

The Supreme Court's decision regarding executive privilege in the case of the United States v. Richard Nixon focused on specifics and left the greater issues of executive privilege untouched. This report summarizes the events leading up to Nixon's confrontation with the Supreme Court and examines the future of executive privilege. Questions raised by this confrontation--Will commercial distribution of evidence lead to unfavorable pretrial publicity? Should a president have the authority to restrict documents which concern the conduct of public affairs? --remain largely unanswered. (KS)

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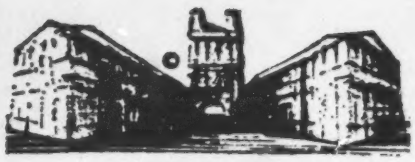

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FREEDOM OF INFORMATION CENTER REPORT NO. 346

ACCESS TO PRESIDENTIAL MATERIALS

This report was written by John Edward Tyler, an M.A. candidate in Political Science at the University of Missouri-Columbia.

The term executive privilege is commonly defined as the asserted power of a President to personally withhold information or to direct employees of the executive branch to withhold information requested by Congress or the courts. This information may come in a variety of forms such as documents, papers, reports, memoranda, or transcripts, to mention only a few. A President will usually invoke executive privilege when he, of his own discretion, decides that disclosure of such information would not serve the public's interest. Often, information included in this category involves foreign affairs or domestic security, albeit a President will refuse to disclose information for a variety of reasons.[1]

The term itself has come into popular usage only recently, but the invocation of the asserted power dates back to our first President. On March 24, 1796, the House of Representatives passed a resolution which directed President George Washington to produce certain documents relating to the formulation of a treaty with Great Britan.[2] President Washington refused to provide the House the information stating the Constitution prevented him from doing so:

> . . . it is essential to the due administration of the Government that the boundaries fixed by the Constitution between different departments should be preserved, (and with) a just regard to the Constitution and to the duty of my office, under all circumstances of this case, forbids a compliance with your request.[3]

It has been generally accepted that in order for Congress to legislate effectively it should be provided with any and all information that might have a bearing in the passage of such legislation. As Woodrow Wilson wrote, long before becoming President, Congress should make this information known to the public:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. (This) informing function of Congress should be preferred even to its legislative function.[4]

Before Congress can become the "eyes and the voice" of the public it must first acquire the information it seeks. Sometimes that information is held in the executive branch of the government, and the President is personally requested to provide it. As events in the past have shown, Presidents have invoked presidential or executive privilege, and have refused to deliver such information. Congress either sought the same information elsewhere or, more often, concluded its investigation without it. There were no attempts to use the federal courts to force the President to personally comply with the request. Congress did utilize the courts to force employees of the executive branch to comply with requested information, but deferred to tradition in dealing with the President personally. The last instance in which a court attempted to force the President to personally comply with an order was during the Aaron Burr trial in 1807.

This paper is a brief review of the controversy between President Richard Nixon, the Congress and the courts over access to the now-famous presidential tapes. It will include a look at the attempts by the Senate Select Committee on Presidential Campaign Activities to gain access to the tapes; the efforts by the two special Watergate prosecutors, culminating in a Supreme Court decision; the role of the House Judiciary Committee during its impeachment investigation; and the current status of the tapes, who owns them and who controls them, in light of the recently passed Presidential Recordings and Materials Preservation Act. Its purpose is to generate a better understanding of the forces which were at play during the controversy — arguments for disclosure as opposed to arguments against disclosure.

Discovery of the Tapes

The Senate Select Committee on Presidential Campaign Activities was created on February 7, 1973, by the unanimous passage of Senate Resolution 60.[5] The resolution authorized the committee to investigate "illegal, improper or unethical activities" which occurred during the presidential election of 1972.[6] To enable the Select Committee to perform its duties the Senate empowered it, among other things, to "subpoena or order any department, agency, officer or employee of the executive branch . . ." to produce

Summary: **The Supreme Court decision in U.S. v. Nixon focused on specifics and left the greater problems of executive privilege largely untouched. The author summarizes the events leading up to the historic confrontation and then looks at the future of executive privilege.**

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any information, documents, or other materials which would aid the committee in its investigation.[7] The committee was also authorized to conduct live television hearings and to propose "new congressional legislation" aimed at correcting any illegal campaign activities.[8]

Many witnesses were called by the committee to provide testimony concerning any information they might have about the Watergate break-in. The disclosure of the presidential tapes was given in testimony before the Select Committee by one of these witnesses. However, the committee had a policy that all witnesses summoned to appear could be interviewed by the committee's staff before testifying in open session.[9] On Friday, July 13, 1973, a former assistant to President Nixon, Alexander Butterfield, disclosed during the staff interview that the President had been secretly recording private conversations in both the White House and the Executive Office Building.[10] This information was withheld and not made public until the following Monday. When Butterfield finally did testify in open session about the tapes he said he had made their existence known because he thought the Select Committee already knew of their existence and were testing his credibility:

> I knew when I was interviewed by your staff members . . . that Messrs. Haldeman and Higby had preceded me. . . . I certainly assumed that each had given an open and honest answer to that particular question, that I was being asked that same question so as to corroborate the fact — by that, I mean their answers.[11]

The White House confirmed the fact that same day that "conversations in the White House (and other buildings had) been recorded since the spring of 1971."[12]

Public reactions to the discovery of the recorded conversations were varied. AFL-CIO President George Meany called (**Time**, 7-30-73) the disclosure "so fantastic as to be almost beyond belief." Former Health, Education and Welfare Director Robert Finch said (**Time**, 7-30-73) he was "literally astonished." Sen. George McGovern (D-S.D.) termed (**Time**, 7-30-73) the recording of private conversations "a violation of privacy." And House speaker Carl Albert called (**Time**, 7-30-73) it "an outrage." However, Vice President Spiro Agnew said (N. Y. **Times**, 7-18-73) he did not mind having his private conversations secretly taped by the President. The Governor of New York, Nelson Rockefeller, said (N. Y. **Times**, 7-18-73) he also did not object to being recorded. And House representative Gerald Ford said (**Time**, 7-30-73) he saw "nothing wrong with the practice."

Why the Tapes Were Recorded

The recording of private conversations was not a novel procedure with the Nixon presidency. Soon after the existence of the tapes was made public the director of the Kennedy Library confirmed (N. Y. Times, 7-18-73) that President Kennedy also had made tape recordings of "highly sensitive" telephone conversations and staff meetings in the White House. And the General Services Administration confirmed (N. Y. **Times**, 7-16-73) that the Johnson Library archives contained "a section of materials" dealing with telephone conversations transcribed by a secretary from Dictaphone belts as well as transcripts of Cabinet Room meetings. President Nixon said when he arrived in the White House he was confronted with a "complex set up where there was a taping capacity, not only in the President's office, the room outside his office, but also in the Cabinet Room, and at Camp David. . . ."[13]

But the question still remained: Why had these Presidents recorded conversations with top officials secretly in the executive's offices? The answer seems to be that they were recorded for historical purposes. As **Newsweek** observed (8-23-65) few public officials have time to keep journals of their activities during their stay in office, and fewer still have the enthusiasm to write their memoirs after they leave office. While many of these officials were reluctant to spend a great deal of time writing their personal histories, most were willing to talk and have them recorded on tape. These oral-history projects provide the kind of spoken documentary that historians of the Lincoln or even Wilson eras are only able to dream about. The Kennedy Library took the major initiative in this area when, after the assassination of President Kennedy, the library archives decided to record interviews with important persons who had known the President. The library had recorded (**Look**, 6-30-64) nearly 450 conversations by the summer of 1964.

While the Kennedy Library interviews were recorded with the knowledge of the interviewee, the same desire for raw historical preservation seemed applicable in recording secret conversations. When, during the heat of the tapes controversy, President Nixon was asked why he had made the tapes he responded that his "advisers felt it was important in terms particularly of national security affairs . . . to have a record for future years that would be an accurate one. . . ."[14] And in his testimony before the Senate Select Committee, Alexander Butterfield seemed to bear out the President's response. Butterfield said, "There was no doubt in my mind they (the taping systems) were installed to record things for posterity, for the Nixon Library. The President was very conscious of that kind of thing."[15] In July 1975 Nixon reiterated (**Columbia Missourian**) his reasons for recording the conversations:

> President Johnson sent word to me that he (had) learned that as one of my first actions upon arriving at the White House I had ordered the removal of the recording devices he had installed there. President Johnson said that the recordings he had made of his conversations while President had proved to be exceedingly valuable in preparing his memoirs and he urged that I reinstall the recording devices.[16]

The Legal Battle Begins

Almost immediately after the discovery of the presidential tapes the judicial process to obtain them began. It was to be the beginning of a long, complex, legal struggle over access to presidential materials. The first to request the tapes was the Senate Select Committee. In an informal letter to the President, Chairman Sam Ervin (D-N.C.) said (N.Y. **Times**, 7-18-73) the committee had "unanimously voted" that the President "provide the committee with all relevant documents and tapes under control of the White House that relate to the matters" the committee was investigating. The special Watergate prosecutor Archibald Cox also requested informally certain tapes for use by the federal grand jury during its investigation of the Watergate break-in.

The President responded negatively to both the Select Committee and the special prosecutor. In a letter to Chairman Ervin the President said "the tapes would not finally settle the central issues before" the committee.[17] He said the tapes were "entirely consistent" with what he had already disclosed concerning his knowledge of the Watergate matter.[18] The President's legal counsel responded in similar fashion to the special prosecutor denying him access to the tapes.

Both the Select Committee and the special prosecutor decided to obtain subpoenas duces tecum, and serve them on the President demanding the taped conversations. On July 23, 1973, the Select Committee, under the powers given to it by the Senate, voted unanimously to issue two subpoenas duces tecum. One subpoena related to five conversations between the President and his former counsel John Dean, while the second related to conversations involving some twenty-five named individuals who may have had some involvement in the Watergate matter.[19] Meanwhile, the special prosecutor went before the United States District Court judge for the District of Columbia, John Sirica, and obtained a single subpoena commanding the President to produce the requested tapes.

The President refused to honor any of the three subpoenas that had been served on him. In a letter to Judge Sirica the President said he would "decline to obey the command" of the court's subpoena.[20] In doing so he said he followed the example of past Presidents "who have consistently adhered to a position that the President is not subject to compulsory process from the courts."[21] In his refusal to obey the two Select Committee subpoenas the President said it would "not be feasible for my staff and me to review thousands of documents to decide which do and which do not fit within the sweeping but vague terms of the subpoena."[22] The Select Committee then voted to take its case before the federal courts and so on August 9, 1973, it filed suit in the District Court for the District of Columbia seeking to force the President to comply with its subpoenas.[23]

Early Compromises

After the President said he would refuse to obey Judge Sirica's order Special Prosecutor Cox obtained a "show-cause" order which directed the President to explain in detail his reasons why he should not have to obey the subpoena. But before the President responded to the "show-cause" order the first of a series of compromises was advanced to help avoid a possible constitutional showdown. Select Committee members Sam Ervin and Howard Baker said (N.Y. Times, 7-29-73) that if they were provided access to the tapes they would screen them before making any of the information public. Their proposal was that they, the President and the special prosecutor, would screen out statements unrelated to the Watergate investigation. The President rejected the compromise.

Pennsylvania Sen. Hugh Scott proposed (N.Y. Times, 7-29-73) that the tapes be screened by a panel of two or three citizens of the highest public repute. He said he hoped "some means might be found by which the President's replies and the President's information (could) be made available to the public." Former Supreme Court Justice Arthur Goldberg recommended (N.Y. Times, 8-10-73) that other former Supreme Court justices listen to the tapes and determine which portions should be given to the investigators. Stressing that every effort should be made to avoid a constitutional showdown, Goldberg, however, excluded himself from the proposed plan.

But the President refused to make any compromises. In his first televised appearance since the existence of the tapes was disclosed (8-15-73) the President said it was time to leave the controversy to the courts, while reiterating a firm position not to compromise. He said, "If I were to make public these tapes, containing as they do blunt and candid remarks on many different subjects, the confidentiality of the office of the President would always be suspect from now on."[24]

Sirica's Decision

After the President had responded to the District Court's "show-cause" order, Judge Sirica handed down his decision. He upheld the validity of the subpoena and directed the President to comply:

> The President contends that the recorded conversations occurred pursuant to an exercise of his duty to "take care that the laws be faithfully executed." Although the Court is not bound by that conclusion, it is extremely reluctant to finally stand against a declaration of the President of the United States on any but the strongest possible (grounds). Need for the evidence requires that a claim not be accepted lightly, but the vitality of Presidential deliberations in like manner requires that the claim not be rejected lightly. The Court is simply unable to decide the question of privilege without inspecting the tapes.[25]

The Court decided to inspect the tapes in camera and then turn over any relevant materials to the federal grand jury. In a statement, the President said he would not comply with Judge Sirica's in camera inspection order and would "seek review" in the Court of Appeals for the District of Columbia.[26]

Nixon Appeals and More Compromises

After Special Prosecutor Cox and White House counsel presented their arguments before the Court of Appeals, the court, in a highly unusual move, declined to make a ruling. Instead the court urged the two parties to seek some type of compromise and report their results back to the court. However, the two parties failed to reach an agreement thus forcing the court to issue an opinion.

On October 12, 1973, the Court of Appeals issued its ruling saying in part:

> We recognize the great public interest, and agree with the District Court that such conversations are presumptively privileged. But we think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case.[27]

After the decision was made, the President responded by proposing a compromise. He decided that to avoid "Supreme Court review" of the appellate court's decision, he would "in this one instance. . . permit a breach in the confidentiality that is so necessary to the conduct of the Presidency."[28] He proposed a compromise that "would comply with the spirit" of the court's decision. His proposal was to submit to Judge Sirica a full written disclosure of the materials requested in the subpoena that had a bearing on Watergate. He would assure the authenticity of this written statement by giving unlimited access to the tapes to Sen. John Stennis (D-Mass.). Stennis was chosen for his integrity and he had agreed to listen to the tapes and verify the contents of the President's written statement. The President refused, however, to allow Judge Sirica to listen to the tapes and check their validity with the written statement. He said "to allow the tapes to be heard by one judge would create a precedent that would be available to 400 district judges."[29] In turn, the President wanted assurances from Special Prosecutor Cox that he would accept the compromise and not appeal the appellate court's decision, and would not subpoena more tapes or materials in the future.

The special prosecutor refused to go along with this compromise and said he would appeal the matter to the Supreme Court. On October 20, 1973, Archibald Cox was relieved of his duties as special prosecutor and the office of the special prosecutor was abolished by the President.

Presidential News Secretary Ron Ziegler said the President had taken the action "because of Mr. Cox's refusal to comply with instructions. . . that he was not to seek to invoke the judicial process further to compel production" of the tapes.[30]

After all this occurred the President still had the District Court's order to comply with. He finally agreed to obey the order and deliver the requested tapes to Judge Sirica for in camera inspection. However, it was soon discovered and disclosed (N.Y. Times, 11-1-73) that two of the requested tapes did not exist. The President himself confirmed that "two conversations requested by the courts . . . were not recorded."[31] In order to verify that they did not exist the President made available to the District Court other tape recordings not covered in the original subpoena. The President recommended that a joint panel of technical experts examine the tapes to search for any tampering, which the President assured there was none. Judge Sirica reviewed the received materials in camera and decided what portions would go before the grand jury.

The Select Committee Continues

During the same time that the special prosecutor was pursuing access to the tapes, the Select Committee was trying, with much difficulty, to also gain access to the tapes. On October 17, 1973, Judge Sirica denied the Select Committee's suit (i.e., to attempt to force the President to comply with their two subpoenas), stating that the court did not have proper jurisdiction to entertain such suits.[32] Judge Sirica said in his opinion dismissing the action, "The court has been requested to invoke jurisdiction which only Congress can grant but which Congress has heretofore withheld."[33] The Select Committee appealed this dismissal.

Meanwhile, Congress was acting to grant the proper jurisdiction to the District Court. The Senate passed a bill which authorized the District Court for the District of Columbia to entertain any civil suit brought by the Select Committee in enforcing any of its powers granted in Senate Resolution 60, one of which was the power to subpoena. The bill was subsequently passed by Congress and became law on December 19, 1973, ten days after the President failed to exercise his veto power. Upon the enactment of the law the Court of Appeals remanded the case back to the District Court in light of the new jurisdiction that had been placed on it.[34]

But the Select Committee was still unsuccessful even after the case was remanded back to the District Court. On January 25, 1974, the court quashed one of the committee's subpoenas (i.e., the one concerning twenty-five named individuals). The court stated that the subpoena was "too vague and conclusory to permit a meaningful response."[35] In handling the other subpoena (i.e., the one involving five conversations between the President and John Dean), the court requested both the President's counsel and the new special prosecutor to file briefs commenting on the appropriateness of releasing these tapes during Watergate criminal trials.[36] The court said it would "weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the committee. . . "[37]

The court ruled that during the Watergate criminal trials the President's claim of privilege came before the interests of the public and the Select Committee and dismissed the suit relating to the remaining subpoena once again. On appeal the Court of Appeals upheld the District Court's dismissal in an opinion stating:

> 'We conclude that presidential conversations are "presumptively privileged," even from the limited intrusion represented by in camera examination by a court. The presumption can be overcome only by an appropriate showing of public need by the party seeking access to the conversations. . . such a showing was made by the Special Prosecutor. . . (but) we find that the Select Committee has failed to make the requisite showing.[38]

Release of Transcripts

On February 6, 1974, the House of Representatives voted 410-4 to conduct an impeachment investigation of President Nixon. The House resolved (H.R. 803) to authorize its Judiciary Committee to "investigate fully and completely" whether there were sufficient grounds to impeach the President.[39] On February 25, 1974, the Judiciary Committee informally requested that the President deliver certain recordings covering forty-two presidential conversations. The President refused to comply which prompted the committee to issue a subpoena to enforce the request.

Instead of physically turning over the tapes the President announced April 29, 1974 that he would release nearly 1,200 pages of transcripts of the requested tapes to the Judiciary Committee and the public. The President said he hoped the transcripts would "at last, once and for all" show his involvement in the Watergate matter.[40]

A New Special Prosecutor

For all that the transcripts were, they were not the physical tapes. After the Judiciary Committee failed to gain access to the actual tapes there was one last attempt to obtain them. This was in connection with the continuing Watergate trials.

After the firing of Archibald Cox as special prosecutor the President said he would appoint a new one. On November 5, 1973, Leon Jaworski was sworn in and put in charge of prosecuting on behalf of the United States. In an effort to help him prosecute, Jaworski went before the United States District Court in Washington, D.C., and requested that a subpoena duces tecum be issued and served on the President demanding sixty-four conversations between the President and his aides. In a statement to the press Jaworski said (N.Y. Times, 4-17-74) he was requesting the subpoena "only after trying in vain for months to obtain tapes and materials from the White House in an informal manner."

Presidential Counsel James St. Clair said the President had released transcripts to the House Judiciary Committee and that the President felt they told everything he knew about Watergate. St. Clair said the President would fight the matter in court rather than turn over any more tapes or materials. He then moved to have the subpoena quashed but Judge Sirica upheld (5-20-74) the validity of the subpoena and ordered the President to turn over the requested tapes.[41]

The President, however, absolutely refused to change his position. Jaworski then filed a petition with the Supreme Court, by-passing the Court of Appeals, asking the court to decide whether the President, after he had assumed sole personal and physical control over evidence material to a criminal trial, is subject to subpoena and judicial order directing that he comply. After extensive hearings and presentation of briefs the Supreme Court handed down its decision.[42]

The Supreme Court Opinion

After the court found that the issue was justiciable and that it had jurisdiction to decide the issue, it ruled on the President's claim of executive privilege as opposed to the

special prosecutor's claim of need for evidence for a criminal trial. The court stated:

> To read the Art II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of a "workable government" and gravely impair the role of the courts under Art III.[43]

Thus, the court ruled that a President does have claim of privilege of materials relating to military or diplomatic matters. But when the desire for confidentiality does not cover military or diplomatic matters and the material is "essential to enforcement of criminal statutes" the President does not have an absolute claim of privilege. The court concluded:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.[44]

The President responded to the court's decision by saying that he was "disappointed" but he would "take whatever measures (were) necessary to comply with (the) decision in all respects."[45]

Who Owns The Presidential Tapes

Even after the Supreme Court handed down its decision, and even after the President complied, the broader question remained — who owns the tapes and other Presidential materials? Until 1955, after a President left office he usually gathered all of his papers and materials together and took them home.[46] Every President since George Washington has considered that the papers and materials they accumulated during their terms in office belonged to them. Until the Nixon tapes controversy there were no serious challenges to this understanding. According to former Archivist of the United States Wayne C. Grover, "(While) it has long been considered that . . . the papers of the Presidents are the property of the Presidents, the Federal Government has a vital interest in them."[47] During hearings for the establishment of a federally controlled system for Presidents to preserve their papers Grover said the size and number of materials a President accumulates during his term has increased dramatically since the Hoover Administration and that a President is simply unable to take care of the materials:

> For example, at the death of Franklin D. Roosevelt his Presidential papers occupied some 500 five-drawer file cabinets, and those of Mr. Harry Truman are only slightly less in volume. Mr. Herbert Hoover's White House papers occupy a substantial portion of the available space in the Hoover Library . . . Thus the day is past when a President or his family can even contemplate personally taking charge of and caring for his White House papers until such time as they feel ready to place them in a public institution.[48]

Legislation was subsequently passed which enabled a President, upon leaving office, to operate a library containing his presidential materials, which would remain his property under the supervision of the federal government.[49] All Presidents since Herbert Hoover have established some type of presidential library housing their materials under control of the General Services Administration.

President Nixon was very much desirous of establishing a library in his honor. As discussed above there is ample indication that the former President was going to house his presidential tapes in such a library. Recently, the former President and the University of Southern California worked out (**Time**, 5-5-75) an agreement whereby the President would turn over all his papers and materials, including the tapes, to the University which would then build a library on the campus at Los Angeles to house them.

From the moment the President left office (8-9-74) problems arose over custody of his papers and tapes. The former President had worked out (**N. Y. Times**, 9-9-74) an agreement with the General Services Administration under which he would retain ownership of his papers and tapes and would ultimately be permitted to destroy the tapes. The agreement provided that all of the tapes and papers be preserved for a period of three years for possible use in future criminal trials, Nixon would be in control of any access to the materials, at some point in the future a substantial portion of the materials would be donated to the federal government including the tapes, and the tapes were to be destroyed at the time of Nixon's death or September 1, 1984, whichever came first.[50]

Immediately after it became public that the former President and the Ford Administration had worked out such an agreement, Congress took steps to alter it. The Senate Government Operations Committee approved (**N. Y. Times**, 9-25-74) a bill that would nullify the Nixon-Ford agreement and keep the tapes and materials permanently in government possession. The bill would allow the former President access to the materials but would prohibit him from destroying any of the tapes without congressional approval. Assistant Senate Minority Leader Robert Griffin (R-Mich.) wanted to amend (**Congressional Record**) the bill to make all documents of all presidents, vice presidents, and members of Congress federal property. However, the amendment failed.[51]

The bill then passed the Senate relatively unchanged and went to the House where a major amendment was added. The change was the creation of an independent seventeen-member commission to study the disposition of the records and documents of all federal officers including Presidents, vice presidents, federal judges and members of Congress.[52] The Senate agreed to this amendment and the bill was passed and sent to President Gerald Ford. Ford signed the bill on Dec. 19, 1974. He would not make any substantive comments except that he would proceed to appoint members to the commission.[53] The commission is scheduled to report to the President and Congress on March 31, 1976, its recommendations. The act, in its final form, is known as the Presidential Recordings and Materials Preservation Act of 1974.[54]

Challenging the Act

The long-standing controversy of the Nixon materials was not resolved by the act. The challenge now emerged from two fronts concerning access to the tapes. Firstly, media representatives claiming First Amendment rights sought release of certain tapes for distribution. Secondly, Nixon demanded custody of all presidential materials on no other ground than that the act was unconstitutional.

During the Watergate trial, the three networks had asked to be permitted to broadcast tapes the written transcripts of which were already released to the public. The ruling of the U. S. District Court for the District of Columbia seemed to remind both television and radio of their lesser position as stepchildren of the print media. Judge Gerhard Gesell rejected (12-5-74) the broadcasters' First Amendment claims to aural copies of the tapes, saying that the printed transcripts alone would satisfy the public's need to know. Though recognizing the Anglo-American courts' custom of allowing members of the public (including journalists) to inspect and copy from evidence, Gesell was wary of possible commercial reproduction of the tapes by broadcasters. He concluded that the release of the tapes to broadcasters must be conditioned on submission of a plan for distribution of copies "which does not permit overcommercialization of the evidence,"[55] and which precluded favoritism.

The plan which broadcasters produced promptly was rejected as readily by Gesell. Judge John Sirica of the same court who took over the matter also refused to honor the networks' request because he was concerned that "the sensitive nature of the presidential tapes" might be abused by commercial recording.

Meanwhile, other media and civic representatives demanded access to Watergate evidence. The Reporters Committee for Freedom of the Press, columnist Jack Anderson and the Committee for Public Justice jointly filed suit to pressure for access to the tapes. What they challenged was the agreement between Nixon and the General Services Administration giving the former President eventual custody of the material.

The joint suit was consolidated with Nixon's case which claims otherwise, that the act putting the Watergate tapes and related documents in the government's custody is unconstitutional. The January 1975 ruling of D. C. District Court Judge Charles Richey supported the media representatives' challenge of the validity of the Nixon-Ford agreement and thus upheld the constitutionality of the act.

Judge Richey's ruling was stayed, however, by the U. S. Court of Appeals for the District of Columbia. It was thought appropriate that a three-judge panel should resolve the complexity raised by the constitutional challenge of the Presidential Recordings and Materials Preservation Act and other motions to gain access to the tapes.

The case still is pending at the time of this writing. If the panel were of the same mind as the Justice Department, Nixon could expect an unfavorable decision. For in a recent brief filed at the court, the Justice Department contended (N. Y. Times, 9-9-75) that the former President "would not be a trustworthy custodian, even temporarily," for the materials in question.

The department's systematic argument aimed to defeat Nixon's challenge of the unconstitutionality of the act. First, Nixon's assertion that providing public access to the materials might inhibit the free speech of those conversing with the President is beside the point since Nixon had taped conversations without advising the other parties. As for the argument that the act would infringe Nixon's First Amendment rights, the Justice Department responded tartly that it is "simply not" the Constitution's purpose to protect an individual from the revelation of past statements which might prove embarrassing.

Conclusion

Until the three-judge panel reaches a ruling, the conclusion of the paper is one in which little is concluded. Despite the Supreme Court's decision to enforce a President's submission of evidence in a criminal trial, several questions remain as to the disposition of the presidential documents after the trial. Will commercial distribution of court evidence, such as the tapes, lead to unfavorable publicity in later trials? Even putting aside the issue of a fair trial, should a former public official — particularly a President — lock up in his private cabinets documents that concerned the conduct of public affairs?

No matter how the three federal judges rule, their decision will be significant as a legal precedent. It will determine whether to erase the small step taken by Congress to tackle the growing mire of presidential tapes and files.

FOOTNOTES

1. One of the most exhaustive and detailed studies of the concept of executive privilege is Raoul Berger's book **Executive Privilege: A Constitutional Myth** (Cambridge: Harvard University Press, 1974). Berger's book does not include much discussion of the Nixon tapes controversy and is more of an historical analysis.
2. U.S., **Annals of the Congress**, 4th Cong., 1st Sess., (1795-1796), Vol. 5, pp. 759-760.
3. James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents**, I (New York: Bureau of National Literature, 1897), pp. 186-188.
4. Woodrow Wilson, **Congressional Government: A Study in American Politics** (15th ed., Boston: Houghton Mifflin Company, 1911), p. 303.
5. U.S., Congress, Senate, Select Committee on Presidential Campaign Activities, **Presidential Campaign Activities of 1972**, Hearings Appendix Part I, 93rd Congress, 1st and 2nd Sessions, June 28, 1974 (Washington: Government Printing Office, 1974), p. 3.
6. Hearings Appendix Part I, p. 3.
7. IBID., p. 11.
8. IBID., p. 4.
9. IBID., p. 47.
10. Hearings Book 5, p. 2073.
11. IBID., p. 2090.
12. U.S., General Services Administration, **Weekly Compilation of Presidential Documents**, Vol. 9, No. 29 (Washington: Government Printing Office, 1973), p. 905.
13. **Weekly Compilation**, Vol. 9, No. 34, p. 1018.
14. IBID., p. 1018.
15. Hearings Book 5, p. 2077.
16. United Press International, July 3, 1975. This quote was taken from the UPI report in the Columbia **Missourian** on July 3, 1975. The event was reported elsewhere but not quoted the same as the UPI report.
17. **Weekly Compilation**, Vol. 9, No. 30, p. 921.
18. IBID.
19. Hearings Book 6, p. 2479. See Also Hearings Appendix Part I, p. 211 et seq.
20. **Weekly Compilation**, Vol. 9, No. 30, p. 933.
21. IBID.
22. IBID.
23. Hearings Appendix Part I, p. 541.
24. **Weekly Compilation**, Vol. 9, No. 33, p. 987.
25. 360 F. Supp. 1 (1973).
26. **Weekly Compilation**, Vol. 9, No. 35, p. 1044.
27. 487 F.2d 700 (1973).
28. **Weekly Compilation**, Vol. 9, No. 42, pp. 1265-1266.
29. IBID.
30. **Weekly Compilation**, Vol. 9, No. 43, p. 1273.
31. **Weekly Compilation**, Vol. 9, No. 46, p. 1329.
32. 366 F. Supp. 51 (1973).
33. IBID., at 61.
34. USC Section 1364 (P.L. 93-190).
35. Hearings Appendix Part I, p. 1185.
36. IBID., p. 1196.
37. 370 F. Supp. 521 at 522 (1973).
38. 498 F.2d 725 at 730 (1973).
39. House Resolution 803.
40. **Weekly Compilation**, Vol. 10, No. 18, p. 459.
41. 377 F. Supp. 1326 (1974).
42. For a compilation of all written briefs, cross petitions, as well as the oral arguments presented by each counsel in the case of **United States v. Nixon** see U.S., Congress, Joint Committee on Congressional Operations, **Court Proceedings of Vital Interest to the Congress**, Report, 93rd Congress, 2nd Sess. (Washington: Government Printing Office, 1974).
43. **United States v. Nixon** 41 L. Ed 2d 1039 at 1062 (1974).
44. IBID., at 1067 (1974).
45. **Weekly Compilation**, Vol. 10, No. 30, p. 829.
46. Discussion of this topic was made by Dr. Wayne C. Grover, former archivist of the United States during hearings for the establishment of presidential

libraries. See U.S., Congress, House, Subcommittee of the Committee on Government Operations, **To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes**, Hearing, 84th Congress, 1st Sess., June 13, 1955 (Washington: Government Printing Office, 1955), p. 28.

47. Presidential Library Hearings, p. 28.

48. IBID.

49. 69 Stat. 695, (P.L. 84-373). See also 44 USC Section 2101 et seq.

50. U.S., Congress, Senate, Committee on Government Operations, **Preservation, Protection and Public Access With Respect to Certain Tape Recordings and Other Materials**, Report, 93rd Congress, 2nd Sess., September 26, 1974 (Washington: Government Printing Office, 1974), p. 5.

51. U.S., **Congressional Record**, 93rd Congress, 2nd Sess. (1974), CXX, No. 149, 18248.

52. U.S., Congress, House, Committee on House Administration, **Presidential Recordings and Materials Preservation Act**, Report, 93rd Congress, 2nd Sess., November 27, 1974 (Washington: Government Printing Office, 1974).

53. **Weekly Compilation**, Vol. 10, No. 51, p. 1595.

54. 88 Stat. 1695, (P.L. 93-526).

55. 386 F. Supp. 639 at 641, 642 (1975).